Supreme Court, U.S.
FILED

No. 94-1375 FEB 10 1995

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

MICHAEL J. LITZENBERGER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari
To the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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February 1995

127pp

QUESTION PRESENTED

Where an Express Mail package, classified under 39 U.S.C. § 3623(d) as mail "sealed against inspection," meets only a very general "profile" for suspicion, and a trained canine has failed to "alert" to the package, does the Fourth Amendment prohibit detention of the package for over 65 hours (including 17½ hours before it was subjected to sniffing by the dog) -- between 20 and 40 hours longer than is ordinarily allowed for delivery?

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LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Michael J. Litzenberger and the Commonwealth of Pennsylvania). In the state supreme court, petitioner's case was consolidated with two unrelated appeals presenting the same sentencing issue. The defendant in one of those cases, Stuart A. Bell, is the petitioner before this Court in Bell v. Pennsylvania, No. 94-1123 (cert. filed, 63 USLW 3518, Dec. 12, 1994).

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REASON FOR GRANTING THE WRIT

This Court has not considered, but should, the application of its cases articulating a standard of "reasonable suspicion" to the detention of Express Mail, and the relevance of the length of any such detention in determining Fourth Amendment reasonableness, in light of developments since the Court considered the brief detention of first class mail in its 1970 Van Leeuwen decision. 24

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

MICHAEL J. LITZENBERGER respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the Superior Court of Pennsylvania, as to which appeal of the issue presented here was denied by the state Supreme Court, affirming his conviction in the Court of Common Pleas for Chester County, Pennsylvania, on charges of possession of a package of marijuana that had just been delivered to him by Express Mail.

OPINIONS BELOW

A copy of the Judgment and Opinion of the Pennsylvania Superior Court on direct appeal (which addresses the federal issue raised in this Petition for

Writ of Certiorari) is attached as Appendix A. It is not published, but is noted at 423 Pa.Super. 635, 616 A.2d 716 (1992) (table). A copy of the Judgment and Opinion of the state Supreme Court, which agreed to review only a state law sentencing issue, is Appendix B. It is published sub nom. Commonwealth v. Bell, 537 Pa. 558, 645 A.2d 211 (1994). The order denying reargument is Appendix C. The trial court issued three opinions and orders addressing the issue presented here, which are also attached: an Opinion and Order denying the motion to suppress (Appx. D), a Memorandum Opinion and Order denying post-trial motions (Appx. E), and a final Memorandum Opinion (Appx. F) following the filing of the notice of appeal. These are not published.

JURISDICTION

The federal question presented in this petition was properly presented to and addressed by the state Superior Court on direct appeal, Appx. A, and then to the state Supreme Court, which declined to hear it, Commonwealth v. Litzenberger, 534 Pa. 647, 627 A.2d 178 (May 7, 1993) (granting review limited to questions of state sentencing law); see Appx. B. The Order of the Pennsylvania Supreme Court denying reargument of its judgment vacating and remanding the judgment of sentence imposed in the Court of Common Pleas for the Chester County, Pennsylvania, was filed September 13, 1994. Appx. C. On December 9, 1994, under No. A-423, Justice Souter granted an extension of time until February 10, 1995, for the filing of this petition. The

petition is being filed on or before that date. Rule 13.1, 13.2, 13.4. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATUTE, REGULATION AND CONSTITUTIONAL PROVISIONS INVOLVED

The Postal Service Act provides, in pertinent part:

> (d) The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. ... One such class shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service. No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered or pursuant to the authorization of the addressee.

39 U.S.C. § 3623(d).

The **Code of Federal Regulations** provides, in pertinent part:

> No person in the Postal Service except those employed for that purpose in dead-mail offices, may open, or inspect the contents of, or permit the opening or inspection of sealed mail without a federal search warrant, even though it may contain criminal or otherwise nonmailable matter, or furnish evidence of the commission of a crime, or the violation of a postal statute.

39 C.F.R. § 233.3(g)(1). For purposes of this regulation, the term "sealed mail" is defined as follows:

> Sealed mail is mail on which appropriate postage is paid, and which under postal laws and regulations is included within a class of mail maintained by the Postal Service for the transmission of mail sealed against inspection, including First-Class Mail, Express Mail, international letter mail, and mailgram messages.

39 C.F.R. § 233.3(c)(3).

The Fourth Amendment to the United States Constitution provides that "The right of the people to be secure in their persons, houses, papers and effects

against unreasonable searches and seizures shall not be violated; ...."

STATEMENT OF THE CASE

This petition arises out of the conviction of the petitioner, Michael J. Litzenberger, on marijuana charges under Pennsylvania law, based on the detention and search by the Postal Service of an Express Mail package. Before trial, his motion to suppress the contraband on Fourth Amendment grounds was denied. He was eventually sentenced to serve a mandatory three to five year term of imprisonment.

a. The Course of Proceedings

Michael Litzenberger, petitioner here and defendant in the trial court, was arrested on March 24, 1990, in Chester County, Pennsylvania, and charged by local authorities with possession of

marijuana with intent to deliver and criminal conspiracy. 35 Pa.Stat. § 780-113(a)(30); 18 Pa.Cons.Stat. § 903. He challenged the detention and seizure of the contraband, and later stood non-jury trial. He challenged on appeal the trial court's suppression ruling and the application, and constitutionality, of the mandatory minimum sentence under 18 Pa.Cons.Stat. § 7508.

The motion to suppress was heard on December 18, 1990, and was ultimately denied by Opinion and Order dated April 9, 1991. Appx. D. After conviction at a non-jury trial on stipulated testimony (as is customary in Pennsylvania to preserve a determinative suppression issue for appeal), petitioner filed post-verdict Motions, which were then required under Pennsylvania criminal procedure to

preserve an issue. The post-verdict Motion for New Trial was denied by Memorandum Opinion and Order dated August 19, 1991. Appx. E. At sentencing, the court overruled objections to the application of the mandatory sentencing law and imposed a sentence of three to six years' imprisonment, along with a $15,000 fine. A timely direct appeal to the state Superior Court followed. The trial court thereafter filed a comprehensive Memorandum Opinion as required by Pa.R.App.P. 1925. Appx. F.

A panel of the Superior Court affirmed the Judgment of sentence in a Memorandum Opinion filed on July 13, 1992. Appx. A. The court reasoned that "the Arizona postal authorities had a reasonable and articulable suspicion that the package contained illegal drugs.

Since the package closely fit the 'profile' of suspicious packages, the canine sniff in Tucson was warranted." App. A-9. The court then examined the length of the delay as an issue of reasonableness of the detention of the package, holding that "Under the circumstances of this case, we do not find a forty hour delay to be unreasonable." App. A-10 to -11. (In fact, as shown below, the uncontested record shows that the detention of the package lasted a total of 65 hours. The Superior Court's analysis that 40 of those hours constituted "delay" is soundly based in the record, however.)

Petitioner preserved his federal suppression issue in his petition for allowance of appeal to the state supreme court, but that court granted review only

of the sentencing issue. Relief was granted in part and denied in part, as to the sentence, in a judgment and opinion filed July 25, 1994, Appx. B, and reargument was denied on September 13, 1994. Appx. C. The lower court denied a stay of resentencing pending certiorari, and proceeded to resentence petitioner to a term of three to five years' imprisonment, pursuant to the state supreme court's mandate. Bail and a stay of execution of sentence pending the filing of this petition was granted, however.

Preservation of Federal Issue. The issue of legality of the search and seizure under the federal Constitution was properly preserved at all levels of the state court system, having been presented in a motion to suppress, preserved on post-trial motions,

including in the Statement of Issues for Appeal, briefed and decided in the Superior Court, and presented in the petition for allowance of appeal to the state supreme court. See Rule 14.1(h); Pa.R.App.P. 302(a). The federal statutory issue was not raised, but on the facts of this case does not call for any different analysis.

b. Statement of Facts - The Suppression Hearing

At the suppression hearing, two witnesses testified. The Commonwealth presented only the testimony of postal inspector Jerry Piotrowicz concerning the initial detention, interdiction and rerouting of the package. Joseph Charles, a Sergeant with the Camden, New Jersey, Sheriff's Department, testified to his handling of a dog sniff of the

package after its removal from the mail stream by Inspector Piotrowicz. From this testimony, the trial court found the following.

At about 6:15 p.m. on Wednesday, March 21, 1990, the United States Post Office at Tucson, Arizona, accepted for Express Mail delivery to Paoli, Pennsylvania, a 34-pound package, measuring some 25 by 25 by 17 inches, heavily sealed with clear plastic tape. Because it was then after 3 p.m. MST, delivery to the Philadelphia area the next day was not guaranteed, as is normally the case with Express Mail, but rather by the second day, that is, on Friday, March 23, by noon (EST) (some 40 hours later). R. 59a.[1] Nevertheless, because the package

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[1] References to "R." are to pages of the Reproduced Record filed in the state Superior Court.

was deemed suspicious by postal authorities, it was detained at the Tucson airport mail facility for over 36 hours; it was not sent on its way to Philadelphia until Friday morning.

Piotrowicz, whose duties included drug investigations, R.34a, received information at 8 a.m. on Friday, March 23, 1990, from a note his supervisor had left him about a call received the previous night from the Postal Inspection Service's Tucson field office at 11:45 p.m. (9:45 p.m. in Tucson). The note stated that the Tucson office had intercepted a package intended for delivery in the Philadelphia area which it said fit a profile used to identify suspect parcels. R.35a. He testified that the Houston and Tucson field offices had developed informal profiles to intercept outgoing

Express Mail parcels during the marijuana harvest season and to identify those parcels that may contain controlled substances. R.37a. The package was due to arrive at the Philadelphia airport at about 4:30 p.m. Friday -- already a day later than promised for its class of mail.

The Tucson authorities had told Inspector Piotrowicz's supervisor that the subject package (1) was large, (2) was heavily taped, and (3) had a return address that was determined, in some unspecified way, to be fictitious. R.39a. The Tucson authorities had removed the package from the mail stream based on this informal "profile" and subjected the package to a canine sniff by a trained drug detection dog employed by the local sheriff's department.

R.41a, 65-66a. The canine was described as having "showed interest," but as not having "alerted," thus indicating that the package did not contain drugs. R.67a. The trial court found that the negative alert by the Tucson drug dog occurred at 11:45 a.m. App. F-6; R.64a. Inspector Piotrowicz knew the Tucson drug dog had indicated an absence of drugs,[2] but told the Chester County police that

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[2] The Superior Court disputed this assertion by noting that the Arizona postal inspector reported that his dog "showed interest" in the package. There is no evidence of what that observation means, if anything, and on cross-examination the witness stated that the dog's response "indicate[d] the lack of presence of controlled substances." R. 67a; see id. 69a.

the dog had "hit" on the package. R.67-69a.[3]

The package was first detained by criminal investigators in the Tucson postal service office either on Wednesday night, March 21, or early on March 22. At 8:54 p.m. (MST), a "profile attachment" was prepared; an hour later, the Tucson postal inspectors called the Philadelphia regional office in New Jersey to say the package would be arriving late the next afternoon, R.58a, several hours past its guaranteed delivery.

The ordinary stream of mailing would have taken the package from Tucson to

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[3] Piotrowicz claimed that to him, "hit on" meant "was exposed to," without implying a positive canine response. The witness admitted, however, that this was not standard usage among law enforcement dog handlers. R. 69-70a.

Philadelphia, either directly or through the postal mail hub in Indianapolis. R.60a. After the criminal investigators in Tucson determined that this package fit their informal "profile," the package was removed from the ordinary stream of mailing. Although the Tucson drug dog "indicated the lack of presence of controlled substances," R.67a, the package was not returned to the ordinary stream of mailing, but rather it was somehow rerouted from the Indianapolis hub through Minneapolis-St. Paul, before arriving in Philadelphia. R.61a.

Inspector Piotrowicz waited for the package to arrive at Philadelphia Airport on the afternoon and evening of March 23, but it failed to arrive. When the parcel eventually came in, postal authorities delivered it to Piotrowicz's office in

New Jersey prior to 7:30 a.m. on Saturday the 24th. R.44a. By that time, the tape at the bottom of the package had somehow come loose during its shipment. R.45a. In addition, a hole had apparently been poked through the package prior to its delivery to New Jersey. R.45-46a, 61a. Piotrowicz testified that when the package was received by him, he could smell the odor of marijuana emanating from the box, R.46-47a, although he apparently neglected to mention this critical fact to the local police officer who applied for the warrant. R.17a.

Inspector Piotrowicz called the canine unit he uses from Camden County, N.J. The New Jersey drug dog came to the postal office, sniffed the now-unsealed package and "alerted" -- reacted positively -- to the odor of a controlled

substance. R.48a. Concerned about the length of the delay in delivery, Inspector Piotrowicz decided to seek a local rather than a federal search warrant, based on his experience that the former process is more expeditious on weekends. R.48-49a.[4] Inspector Piotrowicz called the local police department in Chester County, Pennsylvania, which had jurisdiction over the address to which the package was being shipped. R.49a. Arrangements were then made for a controlled delivery of the package to the addressee by the route's regular carrier, a full day later than

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[4] This decision violated the regulations by which he was bound. See 39 C.F.R. § 233.3(g)(1) (set forth under Statutes Involved, ante). See also Domestic Mail Manual, ch. G012.6.1 ("No employee may permit the execution of a search warrant issued by a state court and served by a state officer.").

guaranteed to that class of mail. After the controlled delivery, but before issuance of the warrant, the package was seized as petitioner began to drive away with it on the back seat of his car. It was later opened pursuant to a local search warrant which had been obtained based on the information gathered after the package was detained and rerouted from Tucson to Bellmawr, N.J.

c. Statement of Facts - The Trial

At trial, the Commonwealth proved that on March 24, 1990, at about noon, the petitioner Michael J. Litzenberger, drove away from an address in Paoli, Easttown Township, Chester County, Pennsylvania, with an unopened, 30-pound box, measuring 25 by 25 by 17 inches, in the rear seat of his automobile. The box had been delivered less than 20 minutes

earlier, addressed to "Michael Litz," by Express Mail from Tucson, Arizona. When the box was later opened by police, they found that it contained some 25 pounds of marijuana. Mr. Litzenberger admitted to police that he was expecting the box to arrive, and knew that it contained marijuana.

REASON FOR GRANTING THE WRIT

This Court has not considered, but should, the application of its cases articulating a standard of "reasonable suspicion" to the detention of Express Mail, and the relevance of the length of any such detention in determining Fourth Amendment reasonableness, in light of developments since the Court considered the brief detention of first class mail in its 1970 Van Leeuwen decision.

The Postal Service Act guarantees that certain classes of U.S. mail are "sealed against inspection," meaning that they may be opened by government agents only pursuant to a warrant. 39 U.S.C. § 3623(d). First class mail and Express Mail are among those classes. 39 C.F.R. § 233.3(c)(3), (g)(1) (1994); Domestic Mail Manual, ch. G012.2.3 (1993 rev.). In United States v. Van Leeuwen, 397 U.S. 282 (1970), this Court held that where "reasonable suspicion," as defined in Terry v. Ohio, 392 U.S. 1 (1968), exists,

first class mail may be detained for between 90 minutes and 26 hours to investigate and determine whether probable cause could be established and a warrant obtained.

The Postal Service itself officially recognizes that Van Leeuwen's interpretation of the Fourth Amendment demands high respect for the security of the people in their papers and effects: a postal inspector "may detain mail sealed against inspection" only if "acting upon reasonable suspicion and without avoidable delay, for a brief period" to conduct a sufficient investigation to obtain a warrant. Domestic Mail Manual, ch. G012.3.1.a (1993) (emphasis added). See also United States v. Jacobsen, 466 U.S. 109, 114 (1984); Ex parte Jackson, 96 U.S. (6 Otto) 727 (1877). This Court

should grant certiorari in this case to review and establish that the leisurely process by which probable cause was assembled in this case involved an unreasonable seizure which was unconstitutional under the Fourth Amendment.[5]

In this case, the Pennsylvania courts upheld detention of a higher class of mail for nearly three times as long as in Van Leeuwen. In that case, the mail was not even delayed, prior to its seizure under the warrant, beyond the date of delivery that could reasonably

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[5] The evidence used against petitioner was ultimately seized under a warrant, the sufficiency of probable cause for which was not challenged. Suppression was available to him as a remedy, notwithstanding the "good faith" rule of United States v. Leon, 468 U.S. 897 (1984), because the warrant was obtained as a result of the initial unlawful seizure, and not through a "genuinely independent source." Murray v. United States, 487 U.S. 533, 543 (1988).

have been expected for registered air mail packages mailed in a small town in northern Washington State and addressed to Nashville, Tennessee, or Van Nuys, California.[6] Petitioner's package was held in Tucson for over 17 hours before being subjected to olfactory inspection by a drug-trained dog, a period which the Commonwealth made no effort to justify. And although that investigation proved negative, the package was not sent on its way for almost 40 hours, when it was already impossible to fulfill the contract for second-day delivery. Again, the purpose, if any, of this further delay went unexplained.

Whether or not there was "reasonable suspicion" initially to detain the

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[6] The Court seems to have understood Van Leeuwen in precisely this light in United States v. Place, 462 U.S. 696, 705 n.6 (1983).

package briefly in Tucson[7] -- compare Florida v. Rodriquez, 469 U.S. 1 (1984) (per curiam), with Reid v. Georgia, 448 U.S. 438 (1980) (per curiam) -- the detention of petitioner's package was not brief by any standard. See United States v. Place, 462 U.S. 696 (1983) (90-minute detention of airline passenger's luggage on "articulable suspicion" was unreasonable under Fourth Amendment due to length of time). The amount of time consumed cannot be explained by any exigencies of the investigation that was undertaken, nor by neutral factors.

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[7] The Superior Court found "reasonable suspicion" to uphold the detention not on the basis of evaluating all the facts (as had the trial court, App. F-5 to -6) but on the basis of satisfying the "profile" simpliciter. App. A-9. In this, the state court flatly defied this Court's controlling precedent. See United States v. Sokolow, 490 U.S. 1, 10 (1989).

Compare Van Leeuwen, supra; United States v. Aldaz, 921 F.2d 227 (9th Cir. 1990), cert. denied, 501 U.S. 1207 (1991) (three day delay in obtaining warrant for Express Mail packages reasonable due to mail schedule and distances from Alaskan bush community).

Moreover, the Tucson postal inspector's suspicion did not ripen into probable cause until Inspector Piotrowicz smelled the odor of marijuana emanating from the package -- which by then had seen its tape loosened and a hole punctured into it -- at his office in New Jersey at 7:30 a.m. EDT Saturday. Johnson v. United States, 333 U.S. 10, 13 (1948) (qualified officer's recognition of odor of drugs establishes probable cause). It had then been almost 60 hours since the package was mailed at 6:15 p.m. MST Wednesday, and was over 20 hours

later than the "guaranteed" second-day delivery time. (Nevertheless, the postal inspector caused even further delay at that point by sending for a drug-trained canine from the local Sheriff's Department.) See United States v. LaFrance, 879 F.2d 1, 7 (1st Cir. 1990) (official detention of private express package upon mere suspicion beyond promised delivery time may be unreasonable). The information assembled during this period of inordinate and unreasonable delay then formed the basis for the warrant application.[8] See generally Annot., Warrantless

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[8] Compare United States v. Caliph, 3 F.3d 399 (11th Cir. 1993) (per curiam) (suspicion and then probable cause arose after timely delivery of Express Mail package had first been attempted; no violation in detention for an afternoon while obtaining warrant), cert. denied, 127 L.Ed.2d 410 (1994); United States v. Lewis, 902 F.2d 1176, 1180 (5th Cir. 1990) (no violation in overnight delay in delivery of Express Mail after it has

Detention of Mail for Investigative Purposes as Violative of Fourth Amendment, 115 ALR Fed. 439 (collecting state and federal cases).

The 60-hour delay in delivering overnight mail before the establishment of probable cause that was tolerated in this case is virtually unprecedented. Cf. United States v. Lux, 905 F.2d 1379, 1381-82 (10th Cir. 1990) (similar total delay, but dog had alerted to package within first day; warrant not obtained

_____(footnote continued)

been secretly searched pursuant to warrant); United States v. Pono, 746 F.Supp. 220 (D.Me. 1990) (once probable cause was established within the contractual Express Mail delivery period, no cognizable Fourth Amendment interest was violated by further overnight delay in obtaining warrant), with United States v. Dass, 849 F.2d 414 (9th Cir. 1988) (two day detention of packages of unspecified class to conduct investigation, followed by 16 to 23 day delay in obtaining warrants, held unreasonable).

until after second alert, next business day). The Pennsylvania courts' upholding of the warrantless detention of petitioner's Express Mail departs significantly from any proper understanding of the Constitution and this Court's cases. Petitioner's only remedy is by way of review in this Court. See Stone v. Powell, 428 U.S. 465 (1976). For all the foregoing reasons, the petition for a writ of certiorari should be granted.

CONCLUSION

For each of the foregoing reasons, petitioner MICHAEL J. LITZENBERGER prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the Superior Court of Pennsylvania.

Respectfully submitted,

PETER GOLDBERGER
Attorney for Petitioner

February 10, 1995.

APPENDIX A

J. A26043/92

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
VS	:	No. 3284 Philadelphia 1991
MICHAEL J. LITZENBERGER Appellant	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of CHESTER County be, and the same is hereby AFFIRMED.

BY THE COURT:

s/David A. Szewczak
PROTHONOTARY

Dated: July 13, 1992

J. A26043/92

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
VS	:	No. 3284 Philadelphia 1991
MICHAEL J. LITZENBERGER Appellant	:	

Appeal from the Judgment of Sentence October 8, 1991 in the Court of Common Pleas of Chester County, Criminal No. 1848-90

BEFORE: CIRILLO, POPOVICH and HOFFMAN, JJ.

MEMORANDUM: **FILED JUL 13 1992**

This is an appeal from a judgment of sentence entered in the Court of Common Pleas of Chester County. We affirm.

Appellant Michael J. Litzenberger (Litzenberger) was convicted at a bench trial, the Honorable Robert J. Shenkin presiding, of possession of marijuana with intent to deliver and criminal conspiracy. Following the denial of his post-trial motions, Litzenberger was sentenced to serve the mandatory minimum

term of imprisonment of three to six years, and to pay a $15,000.00 fine for the possession with intent to deliver conviction. Litzenberger was also sentenced to a concurrent term of imprisonment of eleven and one-half to twenty-three months for the criminal conspriacy conviction. Litzenberger filed a motion for reconsideration of sentence, which was denied. This timely appeal followed.

On March 21, 1990, during the marijuana harvesting season, a large, heavily taped package weighing thirty-four pounds was dispatched at a post office in Tucson, Arizona, which is in close proximity to where marijuana is grown. The package was mailed express mail to "Michael Litz" in Paoli, Pennsylvania. The return address on the package was fictitious and the company listed as

being at the return address was also fictitious. The Arizona postal authorities considered this package "suspect," as it fit the "profile" of packages containing illicit drugs. The Arizona postal authorities interdicted the package so that a trained narcotics dog could sniff it. Sixteen hours later a narcotics dog was obtained to sniff the package and, although the dog did not "alert" to the package, he "showed interest" in it. The Arizona postal authorities then notified the postal inspector in Bellmawr, New Jersey of the suspicious package, the dog's "interest" in it, and the date and time the package was scheduled to arrive at Philadelphia International Airport. The package did not arrive on time, and by the time the postal inspector received it the following morning the tape on the package

had become sufficiently loose to allow a faint odor of marijuana to escape. A narcotics dog in Bellmawr sniffed the package and "alerted" positively to it, indicating the presence of illicit drugs.

The postal inspector promptly delivered the package to the Easttown Police Department. Shortly thereafter, a police officer and an assistant district attorney (ADA) went to District Justice to obtain a search warrant. Meanwhile, a "controlled delivery" was made to Litzenberger. Litzenberger signed for the package, using the name "Michael Litz." A few minutes later Litzenberger and another man got into Litzenberger's car and drove away. The police officer and the ADA had not yet returned with a search warrant. A police officer stationed on the block, who had seen the package earlier at the police station,

recognized the package on the back seat of the car as Litzenberger drove past him. The police officer stopped the car, arrested the occupants and seized the package. A forensic scientist later tested the contents of the package and determined that it contained 25.7 pounds of marijuana.

On appeal Litzenberger raises two issues for review:

> 1. Whether the trial court erred in approving the detention of a package mailed in Tucson, its rerouting more than 1,000 miles out of the ordinary stream of mailing, and its ultimate detention for more than forty hours, after a drug dog had indicated no drugs were present in the package?
>
> 2. Whether the trial court erred in imposing a mandatory minimum sentence pursuant to section 7508 where the Commonwealth failed to comply with that section's notice provision, and where section 7508 is unconstitutional as applied to marijuana cases where the total weight of the substance is less than 1,000 pounds?

Litzenberger first contends that the trial court erred in failing to suppress evidence which was gained by an unlawful search and seizure. Litzenberger contends that by detaining the package for more than forty hours and rerouting it for more than 1,000 miles out of the ordinary stream of mailing, without probable cause or reasonable suspicion, his Fourth Amendment right to be free from unreasonable searches and seizures was violated.

In an appeal from a denial of a motion to suppress evidence, we must determine whether the record supports the trial court's factual findings, and whether the inferences and legal conclusions drawn by trial court from those findings are legitimate. Commonwealth v. Lawrence, 311 Pa. Super. 326, 328, 457 A.2d 909, 910 (1983). In making this

determination, we may consider only the testimony and evidence presented by the defense. Moreover, when the evidence supports the factual findings of the trial court, we may reverse only if there is an error in the legal conclusions drawn from the factual findings. Commonwealth v. Reddix, 355 Pa. Super. 514, 518, 513 A.2d 1041, 1043 (1986).

The United States Supreme Court has held that postal authorities may seize and detain a package if they have a reasonable and articulable suspicion that criminal activity exists. United States v. Van Leeuwen, 397 U.S. 249 (1970). The totality of the circumstances must be taken into account when evaluating whether there is reasonable suspicion of criminal activity. Commonwealth v. Stubblefield, --- Pa. Super. ---, 605 A.2d 799 (1992). Moreover, the Pennsylvania

Supreme Court held that a narcotics dog may sniff a package when the police have a reasonable suspicion that drugs may be in the package. Commonwealth v. Johnston, 515 Pa. 454, 465, 530 A.2d 74, 79 (1987). Here, it is uncontested that the Arizona postal authorities had a reasonable and articulable suspicion that the package contained illicit drugs. Since the package in this case closely fit the "profile" of suspicious packages, the canine sniff in Tucson was warranted.[1]

Litzenberger correctly asserts that the package was detained for more than

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[1] Litzenberger incorrectly asserts that the "dog indicated there were no drugs in the package." The dog did not ignore the package; he "showed interest" in it. This does not support a conclusion that drugs were not in the package. Consequently, the reasonable suspicion that criminal activity existed was not eradicated when the canine in Tucson failed to "alert" to the package.

forty hours. The package was delayed in Tucson for more than forty hours. The package was delayed in Tucson for approximately sixteen hours before a narcotics dog sniffed it, and delayed for an additional twenty hours until the package could be put on a flight to Philadelphia. The package was scheduled to arrive in Philadelphia on March 23rd. Since the package arrived late the postal inspector in Bellmawr did not get it until the following morning, twelve hours behind schedule. Within ninety minutes the package was sniffed by a second narcotics dog, and shortly thereafter the package was delivered to Litzenberger.

The courts have not established or applied a bright line rule for time limits on the detention of a package. Rather, the relevant inquiry is the reasonableness of the detention. Under

the circumstances of this case, we do not find a forty hour delay to be unreasonable. Federal courts have approved four to six day delays of a package mailed by a defendant suspected of using the mail for drug trafficking. See, e.g., United States v. Aldaz, 921 F.2d 227 (9th Cir. 1990) (detention of a package, based on reasonable suspicion, lasting six days did not violate the Fourth Amendment); United States v. Van Leeuwen, 397 U.S. 249 (1970) (90 minute detention based on reasonable suspicion, and total retention in mails of twenty-nine hours, held not unreasonable).

Litzenberger asserts that the package was sent "1,000 miles out of the ordinary stream of mailing." This is irrelevant to the issue in this case. The Arizona postal authorities notified the Bellmawr postal inspector that the

package would be on a specific flight, which just happened to have a connection in Minneapolis. It is not known whether the package was actually on a flight routed through Minneapolis, another hub, or on a non-stop flight since the package arrived several hours late. Nevertheless, mail of this sort, with or without detention, has no priority on the airlines and the Commonwealth certainly does not have control over whether it is sent on a non-stop flight or a connecting flight.

In his last issue Litzenberger challenges the validity of the sentence imposed. LItzenberger was sentenced to the mandatory minimum term required under section 7508 of the Drug Trafficking Sentencing and Penalties provision, ("Trafficking Penalty"), 18 Pa.C.S.A. §7508 (a)(1)(ii). Litzenberger argues

first that the Commonwealth failed to give adequate notice of its intention to seek the mandatory minimum sentence required under the Trafficking Penalty. This argument is without merit. Litzenberger admits that he received a letter from the ADA, before trial, that stated in part: "If forced to go to trial I [the ADA] would have to seek the minimum mandatory sentence." In addition, after conviction, at the sentencing hearing just prior to sentencing the Commonwealth again notified Litzenberger of its intention to seek the mandatory minimum sentence. Thus, the purpose of the notice requirement, which is to give the defendant adequate notice to prepare arguments against imposition of the mandatory minimum sentence, was clearly satisfied.

Litzenberger argues next that the Trafficking Penalty is void for vagueness and therefore unconstitutional as applied to marijuana cases involving less than one thousand pounds. This argument also lacks merit. It is well established in the Commonwealth that "whenever the provisions of two or more statutes enacted by different general assemblies are irreconcilable, the statute latest in date...shall prevail." 1 Pa.C.S. § 1936. The Controlled Substance, Drug, Device and Cosmetic Act, 35 Pa.C.S.A. [sic, meaning 35 Pa.Stat.] § 780-113(f)(2), was enacted in 1972; the Trafficking Penalty was enacted in 1988. Thus, the Trafficking Penalty controls. See Commonwealth v. Morales, 394 Pa.Super. 160, 575 A.2d 148 (1990).

This court's analysis in Morales also disposes of the argument that the

Trafficking Penalty is unconstitutionally vague. Although the Trafficking Penalty does not explicitly set forth the maximum authorized sentence, since the minimum sentence may not exceed one-half of the maximum sentence, 12 [sic, meaning 42] Pa.C.S.A. §9756(b) of the Judicial Code, it implicitly sets forth a maximum sentence of at least six years imprisonment. Accordingly, Litzenberger's challenge to the legality of his sentence must fail.

We conclude that the interdiction of the package by postal authorities was reasonable and that the trial court properly denied Litzenberger's motion to suppress the evidence seized. We also find that the trial court properly sentenced Litzenberger to the mandatory minimum sentence required under the Traf-

ficking Penalty. We, therefore, affirm the judgment of sentence.

Judgment of sentence affirmed.

APPENDIX B

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 0022 E. D. APPEAL DOCKET 1993
	:	Appeal from the Judgment of the
	:	Superior court, No. 03285, Philadelphia,
v.	:	1991, filed July 13, 1992, Affirming
	:	Judgment of Sentence of the Court of Common
MICHAEL J. LITZENBERGER,	:	Pleas of Chester County, Criminal
	:	Division, entered
Appellant		October 8, 1991 at
	:	1848-90

ARGUED: March 7, 1994

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the COURT OF COMMON PLEAS OF COUNTY [sic] be, and the same

is, hereby reversed and remanded for resentencing in accordance with this opinion.

Carol B. Stephany
Carol B. Stephany
Chief Clerk

DATED: July 25, 1994

[J-49-1994]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN/EASTERN DISTRICTS

COMMONWEALTH OF PENNSYLVANIA,	:	No. 35 Western District Appeal Docket 1992
Appellant	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of
v.	:	Allegheny County, Criminal Division, Entered on November
STUART A. BELL,	:	1, 1991, at No. CC 9008151
Appellee	:	
	:	ARGUED: March 7, 1994

* * * * * * *

COMMONWEALTH OF PENNSYLVANIA,	:	No. 36 Western District Appeal Docket 1992
	:	
Appellant	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of
v.	:	Allegheny County, Criminal Division, Entered on November
CHARLES A. TISCHLER,	:	1, 1991, at No. CC 9008122
	:	
Appellee	:	ARGUED: March 7, 1994

* * * * * * *

COMMONWEALTH OF PENNSYLVANIA,	:	No. 22 Eastern District Appeal Docket 1992
Appellee	:	Appeal from the Judgment of the Superior Court, No. 03284, Philadelphia, 1991, filed July 13,
v.	:	1992, Affirming Judgment of Sentence
MICHAEL J. LITZENBERGER,	:	of the Court of Common Pleas of Chester County, Criminal Division,
Appellant	:	entered October 8, 1991 at 1848-90
	:	ARGUED: March 7, 1994

OPINION

JUSTICE ZAPPALA DECIDED: JULY 25, 1994

These consolidated appeals challenge the constitutionality of the mandatory minimum sentencing statute for marijuana trafficking set forth at 18 Pa.C.S. §7508(a)(1)(ii) and (iii). Because we find that this provision can be interpreted consistently with other statutes

in such a way as to provide a maximum sentence for the offenses, we reject the notion that it is impermissibly vague and violates the due process clause of Article 1, Section 9 of the Pennsylvania Constitution. The different factual and procedural backgrounds of these cases shall be set forth separately.

Commonwealth v. Litzenberger

On March 21, 1990, postal authorities in Tucson, Arizona concluded that a package addressed to Michael Litzenberger and delivered to the Post Office for express delivery met their informal profile of packages containing illicit drugs. In particular, the package was large (thirty-four pounds), heavily taped, and the return address contained a fictitious company name and address. The postal authorities therefore detained the package and obtained a

narcotics dog. Although the dog did not "alert" to the package, he "showed interest in it." The postal authorities continued to treat the package as if it might contain contraband and delayed its delivery for a total of forty-four hours.

During the delay, the package was re-routed to Camden, New Jersey, and authorities there were notified of the package's suspicious nature. While the package was en route between Tucson and Camden, it was somehow ripped and the tape had become sufficiently loose to allow the odor of marijuana to escape. The postal inspector in Camden noticed the odor and brought in another narcotics dog who "alerted" to the package. After a controlled delivery of the package, Litzenberger was arrested. A forensic scientist later tested the contents of

the package and determined that it contained 25.7 pounds of marijuana.

Following a non-jury trial, Litzenberger was convicted of possession,[1] possession with intent to deliver marijuana,[2] and conspiracy.[3] He was sentenced to three to six years imprisonment on the possession with intent to deliver conviction pursuant to 18 Pa.C.S. §7508(a)(1)(ii) and was fined $15,000. He was also sentenced to a concurrent term of imprisonment of eleven and one-half to twenty-three months for the criminal conspiracy conviction. Litzenberger filed a Motion for Reconsideration of Sentence, which was denied by the trial court. Litzenberger subsequently

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[1] 35 P.S. §780-113(a)(16).

[2] 35 P.S. §780-113(a)(30).

[3] 18 Pa.C.S. §903(a)(1) and (2).

appealed to the Superior Court, contending that the trial court failed to suppress evidence which was gained by an unlawful search and seizure; that the Commonwealth failed to comply with the notice provision in §7508(b); and that §7508 was unconstitutional as applied to marijuana cases where the total weight of the substance is less than 1,000 pounds. The Superior Court affirmed his convictions, finding no merit to the suppression issue, and holding that his sentence, pursuant to the mandatory minimum set forth in §7508, was proper. We granted allocatur only as to the sentencing issues.

Commonwealth v. Stuart Bell and

Commonwealth v. Tischler

On September 11, 1991, following a bench trial, Stuart Bell and Charles

Tischler were convicted of possession of 116 pounds of marijuana with intent to deliver.[4] The Commonwealth gave timely notice of its "intention to proceed" under the mandatory sentencing provisions established by 18 Pa.C.S. §7508. Bell and Tischler thereafter filed Motions to Bar Imposition of Mandatory Sentence, which were granted by the Court of Common Pleas of Allegheny County.[5] The court found that although the mandatory sentencing provision set forth in §7508-(a)(1)(iii) was applicable to the cases, the provision was in direct contradiction to the sentencing scheme long established by the legislature. It further held that 18 Pa.C.S. §7508(1)(a)(iii), in requiring

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[4] 35 P.S. §780-113(a)(30).

[5] Commonwealth v. Bell, 12 D. & C. 4th 275 (1991).

the imposition of a mandatory minimum sentence without an explicit limitation on the maximum sentence, is void for vagueness and denies the defendants due process of the law, which is guaranteed by Article 1, Section 9 of the Pennsylvania Constitution and the Fifth and Fourteenth Amendments of the Constitution of the United States.

After the denial of post-trial motions, the defendants proceeded to sentencing on November 1, 1991. The court granted reconsideration of the previous ruling, but again decided not to apply the mandatory minimum sentence of §7508(1)≈(a)(iii). The court then sentenced each defendant to a term of imprisonment of one to two years, with probation of five years and a fine of $50,000, plus court costs. The Commonwealth filed a timely Motion to Modify

Sentence, which was denied. We have jurisdiction over the matter pursuant to 42 Pa.C.S. §722(7), which provides that our Court has exclusive jurisdiction of appeals from final orders of the court of common pleas when that court holds a statute invalid as repugnant to the Constitution of the United States or the Pennsylvania Constitution.

Discussion

Three statutes effect sentencing in cases involving illegal delivery and/or possession of marijuana with the intent to deliver. The provisions challenged as unconstitutional in the instant cases are 18 Pa.C.S. §7508(a)(1)(ii) and (iii). Those sections in pertinent part as follows:

> § 7508. Drug trafficking sentencing and penalties

(a) General rule. - Notwithstanding any other provisions of this or any other act to the contrary, the following provisions shall apply.

(1) A person who is convicted of violating section 13(a) (14), (30), or (37) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Devise and Cosmetic Act, where the controlled substance is marijuana shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in subsection:

* * *

(ii) upon the first conviction when the amount of marijuana involved is at least ten pounds, but less than 50 pounds: three years in prison and a fine of $15,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity. . . .

(iii) upon conviction when the amount of marijuana involved is at least 50 pounds: five years in prison and a fine of $50,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity.

18 Pa.C.S. § 7508(a)(1) (emphasis added).[6]

Section 113(f)(2) of the Controlled Substance, Drug, Device and Cosmetic Act (hereinafter, "Drug Act") provides:

> (f) Any person who violates clause (12), (14) or [clause] (30) of subsection (a) with respect to:
>
> > (2) Any other controlled substance or counterfeit substance classified in Schedule I, II, or III, is guilty of a felony and upon conviction thereof shall be sentenced to imprisonment not exceeding five years, or to pay a fine not exceeding fifteen thousand dollars ($15,000), or both.

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[6] Section 7508 was amended as of December 19, 1990. Since all the defendants' criminal conduct occurred prior thereto, the pre-amendment version is applicable and is cited. However, the amendments have no bearing on the issues presented since they merely add an amount of "live plants" which correspond with the marijuana weight categories listed in the statute.

[7] The term "controlled substance" includes marijuana. See 35 P.S. §§ 780-102 and 780-104(1)(iv). Marijuana is

35 P.S. §780-113(f)(2) (emphasis added).

The alleged inconsistency arises from the fact that §7508(a)(1)(iii) sets the minimum sentence for the marijuana trafficking of over fifty pounds at five years, while Section 113(f)(2) provides that five years is the maximum sentence for that offense. This result is incompatible with section 9756(b) of the Sentencing Code, which provides as follows:

> (b) Minimum sentence. - The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed. (emphasis supplied).

42 Pa.C.S. § 9756(b) (emphasis added).

Section 7508(a)(1)(ii) (three year minimum sentence for marijuana traf-

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classified in Schedule I, 35 P.S. § 780-104(1)(iv), and it is not a "narcotic drug" as defined in 35 P.S. § 780-102.

ficking of between ten and fifty pounds) is equally troublesome. Section 113(f)(2) of the Drug Act sets the maximum sentence for the offense at five years, which again results in the minimum sentence exceeding one-half of the maximum sentence.

Litzenberger[8], Bell and Tischler (hereinafter collectively referred to as "Defendants"), along with the Defender Association of Philadelphia as amicus curiae, argue that §7508(a)(1)(ii) and (iii) cannot be constitutionally applied because the ad hoc judicial creation of a maximum sentence makes the penalty unduly vague and unknowable. Defendants contend that due process, guaranteed by Article I, Section 9 of the Pennsylvania

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[8] Litzenberger also raises separate issues concerning this sentence, which will be addressed infra.

Constitution and the Fourteenth Amendment to the United States Constitution, precludes sentences without definite maximums.

The Attorney General as amicus curiae contends that the failure to provide a statutory maximum sentence does not raise constitutional concerns.[9] At

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[9] The Attorney General, as amicus curiae, cites several federal cases and various cases from other states in which it was held that sentencing statutes are not unconstitutionally vague for failure to fix a maximum sentence. These cases are neither persuasive or controlling. It appears that the United States Supreme Court has not specifically spoken on this issue. Even assuming the Court would adopt the approach followed by the federal courts, our court would not be bound by that decision. See, Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991).

We believe that fairness requires that a defendant be notified of the maximum sentence he could face for committing a particular offense. Otherwise, the trial judge is free to impose an arbitrary or discriminatory sentence. Moreover, a defendant who desires to plead guilty to an offense

the same time, however, the Attorney General contends that a maximum sentence in the instance case is provided by 18 Pa.C.S. §1103 (which establishes 20, 10, and 7 year maximum sentences for felonies of the first, second, and third degree, respectively). To support its position that the offense at issue is a felony, the Attorney General relies on the same provision that it argues is impliedly repealed, 35 P.S. §780-113(f)(2). As noted, that provision establishes that one who violates §113(30) with respect to a controlled substance classified in Schedule I, II, or III, is guilty of a

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would have no indication of the wide range of punishment that the trial judge could impose or the amount of time he would have to serve until he was eligible for parole. This interpretation of our Commonwealth's due process clause rests firmly on state constitutional grounds. See, Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

felony punishable by a maximum of five years incarceration. The Attorney General cannot cite the provision for one proposition in order to trigger the application of 18 Pa.C.S. §1103, while contending that it was impliedly repealed by §7508.

In any case, §1103 does not resolve the matter. The general provisions of the Crimes Code set forth the classifications of crimes. Section 106(b)(5) states that a crime declared to be a felony, without specification of degree, is of the third degree. 18 Pa.C.S. §106(b)(5). Thus, §1103 would suggest a maximum sentence of seven years for the violations at issue. This result is inconsistent with the five year maximum set forth in §113(f)(2). Because a specific provision controls over a general one, 1 Pa.C.S. §1932, the five

year maximum sentence in the Drug Act would prevail.

The Commonwealth contends that the five year minimum sentence in §7508 impliedly repeals the five year maximum sentence set forth in §113(f)(2) of the Drug Act because it was enacted later in time. 1 Pa.C.S. §1936. It contends that the minimum-maximum rule of §9756(b) of the Sentencing Code can be given effect by assuming that the legislature intended a ten year maximum sentence since it promulgated a five year minimum.

The Commonwealth finds support for its position in the Superior Court opinions of Commonwealth v. Morales, 394 Pa. Super. 160, 575 A.2d 148 (1990), and Commonwealth v. Guzman, 417 Pa. Super. 364, 612 A.2d 524 (1992).

In Commonwealth v. Morales, the Superior Court held that §7508(a)(1)(iii)

impliedly repealed §113(f)(2) of the Drug Act. The court went on to hold:

> Accordingly, the trial court was required to sentence appellant to a minimum term of imprisonment of five to ten years and a fine of $50,000.00. Although the statute does not explicitly set forth the maximum authorized sentence in cases to which it is applicable, we find that since "a minimum sentence of confinement ... shall not exceed one-half of the maximum sentence imposed," 42 Pa.C.S. §9756(b), it implicitly sets forth a maximum sentence of at least ten years imprisonment and a fine of $100,000.00.

(emphasis added). Id., 394 Pa. Super. at 162, 575 A.2d at 149.[10]

This argument is only superficially appealing. A closer analysis of §9756(b) reveals that although the minimum

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[10] In Commonwealth v. Guzman, 417 Pa. Super. 364, 612 A.2d 524 (1992), the Superior Court reaffirmed its holding in Morales and held that §7508(a)(3)(iii) (corresponding sentencing provision for cocaine trafficking) was constitutional and impliedly repealed the sentencing provisions set out in 35 P.S. §780-113.

sentence may not exceed one-half of the maximum sentence, the statute does not require that the minimum sentence equal one-half of the maximum one. For example, a minimum sentence of five years may be a valid sentence if the prescribed maximum is ten years. However, a five year minimum sentence may also be a valid sentence if the masimum sentence if fifteen years, twenty years or one-hundred years. In all of the examples, the minimum sentence would not exceed one-half of the maximum. Thus, this interpretation would force us to engage in sheer speculation as to which maximum sentence the General Assembly intended. Similarly, the "maximum sentence of at least ten years imprisonment" found in Morales is no maximum at all; it is merely a minimum range of a maximum sentence.

A lawfully enacted statute commands a presumption of constitutionality and should be upheld unless it clearly, palpably, and plainly violates the constitution. Commonwealth v. Blystone, 519 Pa. 450, 549 A.2d 81 (1988), aff'd 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed. 255 (1990).

The initial argument that §7508 impliedly repealed §113(f)(2) is based on the assumption that these provisions are irreconcilable. We find, however, that it is possible for the two provisions to be consistently applied in regards to terms of incarceration.[11]

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[11] As to the provisions regarding fines, §7508(a)(1)(iii) is clearly inconsistent with §113(f)(2) of the Drug Act. The former sets forth a fine of $50,000, while the latter provides that the fine cannot exceed $15,000. This does not change our analysis of the provisions affecting imprisonment.

Section 7508(a)(1)(ii)'s mandatory minimum sentence of three years read together with §113(f)(2)'s maximum five year sentence results in a three to five year sentence for individuals convicted of possession with the intent to deliver between ten and fifty pounds of marijuana.[12] Similarly, one convicted of possession with the intent to deliver at least fifty pounds of marijuana would be sentenced to a flat five year term of imprisonment (five year minimum and five year maximum). This construction

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The fine provisions in §7508 prevail over the fines set forth in the Drug Act since the prefatory language in §7508 directs us to disregard statutes to the contrary. See also, 1 Pa.C.S. §1936 (statute latest in date shall prevail).

[12] The trial couart judge in Litzenberger's case noted in his opinion that although he favored this approach, he found himself bound by Commonwealth v. Morales, 394 Pa. Super. 160, 575 A.2d 148 (1990).

provides us with a maximum sentence and therefore allows us to avoid striking the provisions as void for vagueness.

As noted, however, this result is inconsistent with §9756(b), which states that the minimum sentence cannot exceed one half of the maximum sentence. This, however, does not raise constitutional concerns. Although both parties are correct in asserting that the minimum-maximum rule of §9756(b) is a long-standing concept in our Commonwealth, it is a statutory and not a constitutional provision. Therefore, the prefatory language in §7508 providing "Notwithstanding any other provision of this or any other act to the contrary" carves an exception to the minimum-maximum rule when sentencing a defendant under §7508. The prefatory language does not compel us to disregard the term of imprisonment set

forth in §113(f)(2) since it is possible for §113(f)(2) and §7508 to be consistently applied.

We find this interpretation to be the most desirable since it furthers the intent of the legislature to invoke harsher minimum penalties for drug trafficking, without raising constitutional concerns. We have reviewed the legislative history of §7508 and observed that the sole argument against the provision was the resulting overpopulation of the Commonwealth's prisons. The legislators did not specifically discuss the aspects of a maximum sentence for the offenses referred to in §7508 or the effect that the mandatory minimum sentences in §7508 had on the maximum sentences set forth by the Drug Act. One proponent of the legislation spoke as follows:

> [W]e who represent Pennsylvania and the society of Pennsylvania

> make a policy decision on the issues that we are dealing with - that is the sale of drugs. It is so great and does such a devastating social and economic and personal harm to not only our young people, but our people and our society in general, that in order to deal with this we have to try to provide some deterrents [sic]. This bill is more about deterrents [sic] than punishment . . . [T]hese are people who have these types of drugs in their possession, are people who are not the street seller, but the individual who is involved in it for a business and the kind of people we all want to get off the street to prevent them from continuing their activities.

Senator Greenleaf, February 23, 1988, Legislative Journal at 1784.

Since it appears the legislature was attempting to invoke harsher penalties, we must presume that the legislature intended a five year maximum sentence as set forth in the Drug Act since it is the only constitutional maximum sentence available.

In summary, we hold that although the legislature did not expressly provide a maximum sentence in §7508(1)(a)(ii) or (iii), one can be reasonably implied when that section is read together with §113(f)(2) of the Drug Act. The fact that this construction is contrary to §9756(b)'s minimum-maximum rule is of no constitutional moment.

Defendant Litzenberger also contends that §7508 violates Article III, Section 6 of the Pennsylvania Constitution, which states:

> No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length.

Specifically, Litzenberger argues that the implied repeal of the maximum sentence provided in §113(f)(2) violates the aforementioned constitutional provi-

sion. Since we have given effect to the maximum sentence in §113(f)(2), this claim fails.

Finally, Litzenberger contends that the Commonwealth failed to comply with the notice provision of §7508(b), which provides as follows:

> ...Notice of the applicability of this section to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. . . .

(emphasis added) 18 Pa.C.S. §7508(b).

Litzenberger concedes that defense counsel received a letter from a Deputy District Attorney, before trial, stating in part:

> Defendant faces a minimum mandatory sentence of 3 years and $15,000 fine. If forced to go to trial I would have to seek that minimum mandatory sentence.

He argues, however, that because he did not receive that notice "after conviction and before sentencing," the Commonwealth violated §7508(b).

Assuming the Commonwealth did technically violate the provision, the error, at most, is harmless. See, Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978) (An error is harmless if the Commonwealth proves beyond a reasonable doubt that the defendant was not prejudiced). When arguing this issue prior to Litzenberger's sentencing, defense counsel admitted that he was not surprised that the Commonwealth was seeking the mandatory minimum sentence. Moreover, defense counsel prepared and presented to the trial judge a sentencing memorandum in opposition to the mandatory minimum sentence. Defense counsel even stated to the trial judge that there was

nothing that he could do that he had not already done, and that he was not claiming prejudice due to the lack of notice. (N.T. 10/08/91, 14-10). By receiving notice prior to trial, Litzenberger was given notice earlier than is required by the statute. This claim is therefore meritless.

Accordingly, we reverse and remand the orders of the lower courts for resentencing in accordance with this opinion.

Mr. Justice Castille did not participate in the consideration or decision of this case.

Mr. Justice Papadakos concurs in the result.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1801,

due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

APPENDIX C
[J-49-1994]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN/EASTERN DISTRICTS

COMMONWEALTH OF PENNSYLVANIA,	: No. 22 Eastern District Appeal
	: Docket 1993
Appellee	:
	: Petition for Reargument of the
	: July 25, 1994, Judgment of the
	: Supreme Court of
v.	Pennsylvania on
	: Allowance of Appeal from the Judgment of
	: the Superior Court,
MICHAEL J. LITZENBERGER,	: No. 03284, Philadelphia, 1991,
	: filed July 13, 1992, Affirming a Judgment
	: of Sentence Imposed
Appellant	on October 8, 1991, by
	: the Honorable Robert J. Shenkin of the
	: Court of Common Pleas of Chester County, at
	: No. 78-89

ORDER

PER CURIAM

AND NOW, this 13th day of September, 1994, the Petition for Reargument is denied.

Mr. Justice Castille did not participate in the consideration or decision of this case.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1801, due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

TRUE COPY FROM THE RECORD
Attest: September 13, 1994

s/Patricia Johnson
PATRICIA JOHNSON, Chief Clerk
Eastern District
Supreme Court of Pennsylvania

APPENDIX D

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	CHESTER COUNTY, PENNSYLVANIA
VS.		
	:	NUMBER 1848-90
MICHAEL J. LITZENBERGER	:	CRIMINAL ACTION

Patrick Carmody, Esquire,
attorney for the Commonwealth
Joseph P. Green, Esquire,
attorney for the Defendant

OPINION AND ORDER

Defendant has filed a motion to suppress certain evidence which the Commonwealth intends to use against him. The primary thrust of defendant's position is that the package which defendant wishes to have suppressed was seized illegally (i.e. there was no basis upon which to permit a canine sniff) and that the defendant's car was illegally seized because the police failed to

obtain a search warrant. Defendant concedes that the police did not have sufficient evidence to obtain a warrant until circumstances had become so exigent that a seizure without warrant was permissible but argues that from the evidence which they did have and from that which was reasonably foreseeable they could have obtained a warrant in anticipation of the developments which did in fact later occur.

The first question to be addressed is whether the seizure and detention of the package by postal authorities was reasonable. The following facts briefly describe the detention.

A package addressed to Michael Litz, at a certain address in Paoli, Pennsylvania, was mailed on March 21, 1990, after approximately 6:15 p.m. from Tucson, Arizona. Arizona authorities

labeled the package "suspect", since various facts involving the mailing fulfilled a "profile". Due to the suspicious nature of the package, the authorities had it removed from regular mailing and had it sniffed by Bart, a trained narcotics' sniffing dog. The dog did not "alert" to the package but showed interest in the package.

Subsequently the Arizona authorities notified the postal inspector in Bellmawr, New Jersey that this package would be mailed to Philadelphia Airport on March 23, 1990. The New Jersey postal inspector went to pick up the package on March 23rd but it had not arrived by 4:30 p.m., as scheduled. Instead, it arrived some time after 7 p.m., after the postal officer had left the airport. Before leaving at 7 p.m., the postal inspector requested that the package be forwarded

to his office in Bellmawr. The package was in Bellmawr before the postal inspector arrived at 7:30 A.M. on the 24th. The package was damaged and the officer detected an odor emanating from the package which he believed to be characteristic of marijuana. The postal officer than arranged for a canine sniff which proved positive. Subsequently he notified the appropriate law enforcement agencies in Pennsylvania and the appropriate mailman, and the package was delivered at approximately 11:45 p.m. that same day. After the package was delivered, the defendant placed the package in an automobile which had been parked in the driveway and began to drive away. At that point the car was stopped and searched, the package located and the defendant arrested. At that point no search warrant had been sought.

The United States Supreme Court in United States v. Van Leeuwen, 397 U.S. 249, 251, 90 S.Ct. 1029, 1031, 25 L.Ed. [sic] 282 (1970) found that reasonable suspicion of criminal activity can justify the brief detention of a package, even though packages are, however, protected from unreasonable searches by the Fourth Amendment. Thus we are left to determine the reasonableness of the interdiction and to determine if this detention ripened into a seizure. We find that the original detention was valid and that such detentions can be based upon a "profile". In this case, the size of the package, the fake return address, the weight of the package, and the heavy tape, coinciding with the region from which the package was mailed and the time of year, were enough to find reasonable suspicion to initially detain.

Since the dog sniff does not violate the integrity of the package, it is not a search within the meaning of the Fourth Amendment. State v. Morrow, 128 Ariz. 2d 309, 625 P.2d 898 (1981).

In a similar fact situation dealing with time or delay in mailing, one Court has ruled that a detention of six days for one package and four days for three other packages was reasonable. U.S. v. Aldaz, 921 F.2d 227 (9th Cir. 1990)[.] In Aldaz the delay was due to several factors. Initially, the package was not on the flight scheduled and the postal inspector was unsure of what flight the package might be on. Secondly when the package did arrive it was in evening hours after the postal inspector's work day had ended. It also took a fair amount of time for the postal inspector to obtain a drug dog and lastly it took

five hours for the postal inspector to obtain a search warrant after the drug dog had alerted positively. The Ninth Circuit analyzed U.S. v. Van Leeuwen in determining that the delay was reasonable.

In the instant matter the package arrived late, and the postal inspector requested it to be forwarded to his office when it did arrive. The package was in his office waiting for him the very next morning and a drug sniffing occurred within one hour and a half and delivery was taken by 11:45 A.M. that same day. It is important to note that ". . . time of detention is not necessarily synonymous with, or even a reliable proxy for intrusiveness of detention." U.S. v. LaFrance, 879 Fed. 2d 1 (1st Cir., 1989).

We find that the only real rerouting of the package was when it was taken in the evening of March 23rd or early morning March 24th to the Post Office at Bellmawr, New Jersey. However, the package was still delivered by the next day's mail in Pennsylvania. This rerouting to New Jersey did not cause any significant additional delay. We have no difficulty in finding that the postal inspectors in Bellmawr had sufficient information to justify the second sniff, even though the Tucson dog, Bart, did not alert but merely showed interest in the package. The Pennsylvania Supreme Court in Comm. v. Johnston, 515 Pa. 454, 530 A.2d 74, 79 (1987) opined that "we believe that there is a Fourth Amendment middle ground applicable to the investigations conducted by police handlers of narcotics detention dogs." The Court has

established a two pronged test to determine the reasonableness of a sniff. The court held that dogs may be used for testing the presence of narcotics where:

1. The police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test; and,

2. The police are lawfully present in the place where the canine sniff is conducted.

Applying that test to the facts of this case, we find that an articulable reasonable suspicion that drugs might be in the package existed and the postal authorities were lawfully situated when the search was conducted. The postal inspector knew the facts from which the Arizona authorities had determined that the package fit a certain profile (mailed

for express delivery, mailed from a region in close proximity to where marijuana is harvested, mailed during harvesting season, very large and very heavy, very heavily taped, bearing a fictitious return address) and that the package had the odor of marijuana emanating from it. In the absence of any indication to the contrary, we will not ascribe any ill motive or deliberate action as the cause of the damage to the box.

Lastly we concern ourselves with the question of whether the police were required to obtain an "anticipatory search warrant". We do not believe that any Court has held that the police are required to obtain a warrant when they do not have facts sufficient to justify the issuance of a warrant just because they have a reasonable belief that facts will

occur in the future which would give them cause to then obtain a warrant and we will not undertake on our own to so extend the law. Although anticipatory search warrants are apparently permissible in Pennsylvania, Commonwealth v. Riviera, 387 Pa. Super. 196, 563 A.2d 1252 (1989), they have not yet been ruled to be mandatory. Commonwealth v. Riviera, supra, is a case of first impression in Pennsylvania with regard to anticipatory search warrants. Although the Court found such warrants to be valid, in concurrence Judge Tamilia wrote:

> ". . . I do not take our holding to be authority for the proposition that an anticipatory search warrant must issue in every case where the police have reason to believe criminal activity is to take place in the immediate future."

Similarly, in U.S. v. Panitz, 907 F.2d 1267 (1st Cir. 1990) the Court stated:

> "Appellants have directed us to no federal case purporting to require that the government obtain an anticipatory search warrant." Id at 1271, n.3

The defendant's suggestion that the officers may have had time to obtain an anticipatory search warrant is not therefore dispositive in this case. Even if the officers could have obtained a warrant in anticipation of activity which was to occur and even if such warrant would have been valid under the circumstances of this case, the officers were not required to obtain such warrant and their failure to do so does not invalidate the otherwise legal search would occurred in this case.

For the reasons set forth above, we hereby issue the following

O R D E R

AND NOW, this 9th day of April, 1991, it is hereby ORDERED that defendant's motion to suppress is DENIED.

BY THE COURT:

s/Robert Shenkin
J.

Certified From The Record
This 9th Day of April 1991
s/Edward G. Schmid
----Clerk of Common Pleas Court

APPENDIX E

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	CHESTER COUNTY, PENNSYLVANIA
VS.		
	:	NUMBER 1848-90
MICHAEL J. LITZENBERGER	:	CRIMINAL ACTION

Patrick Carmody, Esquire,
attorney for the Commonwealth
Joseph P. Green, Esquire,
attorney for the Defendant

M E M O R A N D U M O P I N I O N
A N D
O R D E R

This matter comes before us on defendant's post-verdict motions. Defendant's motion is for a new trial and is based entirely upon the contention that we should have granted defendant's pre-trial motion to suppress certain evidence. Defendant contends that this evidence was unlawfully seized and subsequently unlawfully searched and,

therefore, should not have been admitted into evidence against him at trial. For the reasons for which we denied defendant's motion to suppress, we also deny these post-verdict motions.[1] Accordingly, we hereby enter the following

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[1] We are satisfied that the authorities in Arizona acted appropriately in relying upon a package "profile" and, therefore, had the requisite legal grounds to detain the evidence in question, a package, and subject the package to a sniff by a trained canine. Thereafter the postal authorities in the Philadelphia area also had a reasonable suspicion of criminal activity sufficient to warrant subjecting the package to a second exposure to another dog trained to detect narcotics. Once we come to that conclusion, it is obvious that the events which transpired following the second sniff were sufficient to justify the authorities' actions. Indeed, we believe that the defendant has all but conceded that his argument is with the treatment of the package (detention and exposure to the dog in Arizona, subsequent alleged removal of the package from the ordinary stream of package delivery, and detention and exposure to a second sniff in Philadelphia and Bellmawr, New Jersey) up to the point of the second sniff in New Jersey and not thereafter.

O R D E R

AND NOW, this 19th day of August, 1991, upon consideration of the post-verdict motions filed on behalf of the defendant and the arguments of counsel, written and oral, with respect thereto, the said post-verdict motions are hereby DENIED;

Second, we are satisfied that there is no requirement in Pennsylvania that an anticipatory search warrant be obtained (although their use is certainly permissible under appropriate circumstances), Commonwealth v. Riviera, 382 Pa.Super. 196, 563 A.2d 1252 (1989) and that even if anticipatory search warrants were required in some cases, the facts of this case would not have so mandated. There is no evidence to suggest that the police knew or even had substantial reason to believe that the package would not remain at the premises to which it had been delivered for a period of time sufficient for them to obtain a search warrant after delivery of the package. Only when the package was placed in an automobile and was being driven away did the exigency for seizing the package without a warrant arise. Once that exigency did arise, however, the requirement of a warrant, anticipatory or otherwise, was vitiated.

AND IT IS FURTHER ORDERED that the Adult Probation Office shall prepare a Pre-Sentence Investigation Report in this matter;

AND IT IS FURTHER ORDERED that the Court Administrator shall list this matter for sentencing on the first available date after completion of the aforementioned Pre-Sentence Investigation Report.

BY THE COURT:

s/Robert J. Shenkin
J.

APPENDIX F

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	CHESTER COUNTY, PENNSYLVANIA
VS.		
MICHAEL J. LITZENBERGER	:	NUMBER 1848-90
	:	CRIMINAL ACTION

Patrick Carmody, Esquire,

attorney for the Commonwealth

Joseph P. Green, Esquire,

attorney for the Defendant

M E M O R A N D U M O P I N I O N

On April 9, 1991, following a non-jury trial, the defendant was found guilty of possession of marijuana with intent to deliver[1] and criminal conspiracy[2]. Following the denial of

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[1] 35 P.S. §780-113(a)(30)

[2] 18 Pa.C.S.A. §903(a)(1) and(2)

defendant's timely filed post-trial motions by order dated August 19, 1991, defendant was sentenced to a term of not less than three nor more than six years in prison and a fine of $15,000.00 on the possession charge and a concurrent term of eleven and a half to twenty-three months on the conspiracy charge. Defendant then filed a motion to modify sentence, which was denied by order of this court dated October 25, 1991. Prior to trial, defendant had filed various motions, among them a motion to suppress evidence which was denied, after hearing immediately prior to trial, by order dated April 9, 1991. On October 28, 1991, defendant filed an appeal to the Superior Court. Accordingly, pursuant to Pa.R.A.P. No. 1925, we file this brief statement in the form of an opinion setting forth the reasons for our orders.

The reasons set forth herein supplement those reasons which may be found in our prior orders and opinions referenced above, particularly those of April 9 and August 19, 1991.

After the filing of the notice of appeal, we filed an order pursuant to Pa.R.A.P. No. 1925(b) directing the appellant to file a concise statement of matters complained of. The defendant's statement sets forth as his complaints on appeal our denial of the motion to suppress and the propriety of the sentence which we imposed. Although it may have been a better practice to have specifically set forth the nature of the issues intended to be raised on appeal with respect to the suppression order, defendant simply referred to the post-trial motions. However, since those motions set forth these issues briefly

and succinctly, we will not deem those issues waived. Thus, defendant argues not only that the sentence imposed is illegal but also that certain evidence should have been suppressed because it had been unlawfully detained by law enforcement authorities without reason or authority and also because that same evidence was seized during an unlawful search and seizure. Defendant contends that the search and seizure were unlawful because of the absence of a search warrant.

A brief review of the facts will help illustrate the reasons for our actions. A package addressed to Michael Litz, 1511 Green Lawn Road, Paoli, PA 19301, with a return address of Desert Concepts, 2521 Ina Road, Tucson, Arizona, 85741, was mailed on March 21, 1990, from Tucson, Arizona. Arizona authorities

found the package to be suspicious because it had certain characteristics which they found caused it to fit a "profile" of suspicious packages:

1) it was mailed express mail;

2) it came from a portion of the country in close proximity to where marijuana is harvested;

3) it was sent during marijuana harvesting season;

4) the package was large and heavy (34 pounds);

5) the package was heavily taped;

6) the return address on the package was fictitious; and

7) the company listed as being at the return address was fictitious;

The Arizona authorities removed the package from regular mailing in order to have it sniffed by Bart, a trained narcotic dog, at 11:45 a.m. on March 22,

1990, -- approximately sixteen hours after it was first put in the mail. Bart did not "alert" to the package but did "show interest". Arizona authorities immediately notified a postal inspector in Bellmawr, New Jersey, that this package would be mailed to Philadelphia Airport the next day, March 23, 1990. At that point the postal authorities in the Philadelphia area also had a reasonable suspicion of criminal activity sufficient to warrant subjecting the package to a second exposure to another dog trained to detect narcotics.[3] On March 23, 1990,

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[3] Once we come to that conclusion, it is obvious that the events which transpired following the second sniff were sufficient to justify the authorities' actions. Indeed, we believe that the defendant has all but conceded that his argument is with the treatment of the package (detention and exposure to the dog in Arizona, subsequent alleged removal of the package from the ordinary stream of package delivery, and detention

postal inspector Jerry Piotrowicz, waited at Philadelphia Airport until 7 P.M. but the package had not yet arrived. He left, but requested that the package be sent to his Bellmawr office. On March 24, 1990, the package was at Piotrowicz' office upon his arrival to work at 7:30 A.M. Piotrowicz stated that he immediately smelled the odor characteristic of marijuana emanating from the package. He noticed that the package had apparently become damaged in transit and that the tape on the package was loosened, thus permitting the odor to be perhaps more apparent than it had been in Arizona. The Camden County Sheriff's drug dog, Max, alerted positively to the

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and exposure to a second sniff in Philadelphia and Bellmawr, New Jersey) up to the point of the second sniff in New Jersey and not thereafter.

between 8:30 and 9:00 A.M. that morning, again indicating the presence of marijuana in the package. Additionally, the package, in Piotrowicz' opinion, had characteristics which caused it to fit the profile of illegal contraband. Inspector Piotrowicz then called Easttown Police and delivered the package to them at approximately 10:00 A.M. A "controlled delivery" was made at approximately 11:45 A.M. on this same date to the defendant, Michael Litzenberger. Shortly thereafter, the defendant left his residence in a car. The defendant had placed the package in the back seat of the vehicle, where it was visible to the police. The police subsequently detained the vehicle and seized the package. The defendant was arrested and thereafter the package was searched and found to contain a quantity

of marijuana.

The defendant contends that the detention of the package in Arizona and again in New Jersey was illegal, and that the seizure after delivery was illegal because of the failure of the Commonwealth to have obtained search or arrest warrants.

In considering the detention of the package by the Arizona authorities, we do not consider that the use of the magic word "profile" advances matters to any degree. The important consideration is the facts which make up the particular profile. So long as those facts <u>in their totality</u> give rise to a reasonable suspicion of criminal activity, the investigatory detention of the package is permissible. Thus, if the testimony were limited to the conclusion that the

package "fit a profile"[4], the stop would not be justified. If the testimony goes

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[4] We believe that the existence of a predetermined "profile" has efficacy to the extent that it bears upon the reasonableness of the conclusion drawn by the law enforcement officer. In other words, it seems to us that if the officer is aware that persons exhibiting a certain set of characteristics have a statistically significant positive correlation with criminal activity, then the existence of that knowledge may be taken into consideration together with all of the officer's other relevant knowledge in ascertaining whether or not the officer's suspicion of criminal activity was reasonable. Again, merely labelling [sic] something a "profile" is of no particular significance. The focus must be upon the totality of the facts, which in this scenario would be the facts upon which the officer bases his or her conclusion that the profile is valid. For example, the reliability and expertise of the organization which developed the profile, the number of cases studied, the number of factors identified, the scientific validity of the method used to develop the profile and other similar facts are all examples of the type of evidence an officer may give in support of his or her conclusion as to the validity of the judgment drawn from the fact that a person fits a particular "profile."

further and sets forth the facts which make up the profile, but those facts are not sufficient to give rise to a reasonable suspicion of criminal activity, still the stop would not be justified. But when, as here, the testimony sets forth the facts which cause the evidence to fit the "profile" and those facts are sufficient to give rise to reasonable suspicion, then with or without the conclusion that the facts cause the package to fit a "profile", the investigatory detention is warranted. Thus, we are satisfied that the authorities in Arizona had the requisite legal grounds to detain the evidence in question and subject it to a sniff by a trained canine. State v. Ochoa, 112 Ariz. 582, 544 P.2d 1097 (1976); State v. Graciano, 134 Ariz. 35, 653 P.2d 683 (1982). See also U.S. v. Sokolow, 490

U.S. 1, 109 S.Ct 1581 (1989). Inspector Piotrowicz had knowledge of this same information, which was sufficient cause to permit him to direct the package to be routed to his office and to then investigate the package upon its arrival.

We have considered the possibility that the inconclusive result of the dog sniff in Arizona negated the reasonableness of the suspicion of Inspector Piotrowicz and have concluded that it did not. In other words, the information known to Inspector Piotrowicz was the same as that known to the Arizona authorities when they first detained the package except that Inspector Piotrowicz knew from his first contact with the case (which the Arizona authorities did not originaly know) that the canine sniff conducted in Arizona was inconclusive. When a law enforcement officer has a

reasonable suspicion based upon facts which he believes to be true and then discovers that one or more of those "facts" turns out to be untrue, the basis for holding the reasonable suspicion may in some cases be destroyed, Commonwealth v. Daniels, ___ Pa. Super. ___, ___ A.2d ___ (W.L. 228035, 1991) but that will not invariably be the result. Each set of facts must be examined on a case by case basis to determine whether or not the remaining facts, considered in the context of the additional information that a fact (such as a key element of a profile) at first assumed to be true is found to be false, still give rise to a reasonable suspicion. In this case we are satisfied that at the time Inspector Piotrowicz decided to detain the package for investigation, the totality of the circumstances gave rise to a reasonable

suspicion of criminal activity and justified his further examination of the package. Causing the package to be routed via his Bellmawr office does not cause such a removal from the stream of commerce so as to be in and of itself a seizure of the package, beyond the limits of investigation permitted on the basis of a reasonable suspicion. Of course, once Inspector Piotrowicz personally observed the package and smelled the odor emanating from it, the level of his suspicions naturally rose. The positive alert given by Max, the trained drug sniffing canine, served to increase that suspicion to the point where the facts then known to Inspector Piotrowicz constituted probable cause to obtain a warrant to seize and search the package.[5]

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[5] At the hearing on the defendant's

While the controlled delivery was being effected, a warrant was being

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motion to suppress we permitted Inspector Piotrowicz to testify as to information which he had received from another inspector in Bellmawr which included information which that inspector had received from the authorities in Arizona. Such evidence is admissible not only because it is the type of intra-departmental report normally utilized by inspectors and other similar authorities in the course of their work, but also, more importantly, because the testimony was not hearsay, the basis upon which the defendant objected to its admission. The testimony in question is not hearsay because the issue is not whether such information is true or not but, rather, did the inspector have that information. Thus, if the statements in question were made to Inspector Piotrowicz, regardless of the actual underlying truth of those statements, (as opposed to the reasonableness of Inspector Piotrowicz's belief in their truth) then Inspector Piotrowicz had the necessary basis to go to the Philadelphia Airport and be on the lookout for the package in question. Inasmuch as the sources of information were clearly reliable, the only issue remaining was whether or not those sources in fact made the statements in question. Inspector Piotrowicz' testimony on that issue is clearly admissible.

sought. Defendant argues that the controlled delivery should not have been made until the warrant was obtained or, if the delivery were so made, that the police could not arrest the defendant nor seize nor search the package without a warrant, because there was time to have obtained a warrant for defendant's arrest in anticipation of the defendant committing illegal activity. In the first place, this record does not support the conclusion that the police had sufficient time to obtain a warrant or that they deliberately refrained from doing so. Defendant argues that the police were in control of the timing of the delivery of the package, but there is no authority for the proposition that they were required to delay the delivery in order to first obtain a warrant. Indeed, there are sound reasons why the police would

wish not to delay the delivery of this package any longer. Second, in any event, we are satisfied that there is no requirement in Pennsylvania that an anticipatory search warrant be obtained (although the use of such warrants is certainly permissible under appropriate circumstances), Commonwealth v. Reviera [sic], 382 Pa.Super. 196, 563 A.2d 1252 (1989) and that even if anticipatory search warrants were required in some cases, the facts of this case would not have so mandated. There is no evidence to suggest that the police knew or even had substantial reason to believe that the package would not remain at the premises to which it had been delivered for a period of time sufficient for them to obtain a search warrant after delivery of the package. Only when the package was placed in an automobile and was being

driven away did the exigency for seizing the package without a warrant arise. Once that exigency did arise, however, the requirement of a warrant, anticipatory or otherwise, was vitiated.

The final issue raised in defendant's statement of matters complained of on appeal is the sentence imposed. As noted above, the defendant was sentenced to a term of not less than three nor more than six years in prison and a fine of Fifteen Thousand Dollars on the charge of possession of marijuana with intent to deliver. Defendant argues that the mandatory minimum penalty which we found applicable to this offense is unconstitutional as enacted and unconstitutional as applied to this defendant. We know of no authority which supports defendant's position. We found

no constitutional defect in the statute[6] requiring the imposition of a mandatory minimum penalty for this offense and accordingly complied with that statutory requirement when sentence was imposed. Defendant also argues that it was error to impose a maximum term of six years imprisonment when the statutory maximum for this offense is five years. Although we agree that the result appears anomalous on its face, we believe that the sentence imposed is that required by Commonwealth v. Morales, 394 Pa.Super. 160, 575 A.2d 148 (1990).

In the Morales case, the defendant also questioned the legality of his sentence. Defendant Morales was sentenced after a plea of guilty to the crime of possession with intent to

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[6] 18 Pa.C.S.A. §>7508<(a)(1)(ii)

deliver fifty-five pounds of marijuana. Morales was sentenced to a term of imprisonment of five to ten years and a Fifty Thousand Dollar fine. The maximum penalty set forth in the Controlled Substance, Drug, Device and Cosmetic Act for this offense is a term of imprisonment of five years and a fine of Fifteen Thousand Dollars, 35 Pa.C.S.§780-113(f)(2). However the trial court imposed the more severe penalty pursuant to the statute, 18 Pa.C.S.A. §7508, which imposes a mandatory minimum sentence for this same crime. The trial court also followed the requirement that the minimum sentence not exceed one-half of the maximum sentence, 42 Pa.C.S.A. §9756(b). The Superior Court concluded that the mandatory minimum sentence was applicable and that the requirement that the minimum sentence not exceed one-half of the

maximum sentence was also applicable and that these two statutory provisions took precedence over the maximum sentence apparently otherwise set forth in the Drug Act.

Thus, in this case, as in the Morales case, supra, we have three statutory provisions in conflict. The applicable provision of The Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S.§780-113(f)(2), provides for a sentence for this offense of a term of imprisonment "not exceeding five years"; 18 Pa. C.S.A. [§7508](a)(1)(ii) requires a minimum term of not less than three years; and 42 Pa. C.S.A. §9756(b) requires that the minimum not exceed one-half of the maximum sentence imposed. Obviously, if the minimum sentence imposed is three years and that minimum may not exceed one-half of the maximum,

the maximum must be at least six years, which is more than the five year maximum set forth in the Drug Act, supra. Thus, we are required to sentence to a minimum term of not less than three years and therefore a maximum term of at least six years, but yet to not more than five years, all of which taken together constitute a mathematical impossibility.

In our view, the resolution achieved by the Morales court is not the only possible resolution of this apparent conflict and, indeed, might not be the one constitutionally required. If one views the deviation from the maximum penalties set forth in the Drug Act as a violation of the right of the defendant to be sentenced in accordance with the law as it was apparently clear on the books at the time the violation occurred, then it might have been viewed as over-

riding the requirement that the maximum term otherwise be at least double the minimum term. In that event, the appropriate sentence in this case would have been to a term of imprisonment of not less than three nor more than five years in addition to the fine of Fifteen Thousand Dollars. But for the teaching of the Morales case, supra, we would have imposed that sentence. Believing ourselves bound, however, by the Morales decision, we imposed the sentence from which this defendant now appeals.

BY THE COURT:

s/Robert J. Shenkin

J.

Date: December 5, 1991

Certified From The Record
This 6 Day of Dec. 1991
s/Helen Olseski
Deputy Clerk of Common Pleas Court

MAR 6 1995

No. 94 - 1375

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

MICHAEL J. LITZENBERGER,
Petitioner

VS.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

I. Whether the suppression court correctly admitted into evidence the 25.7 pounds of marijuana seized from Petitioner, as the suppression court correctly followed this Court's unanimous decision in United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970), which held that Postal authorities may seize and detain a package if they have a reasonable and articulable suspicion that criminal activity exists?

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COUNTER-STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On April 9, 1991, following a non-jury trial on stipulated testimony, before the Honorable Robert J. Shenkin, Petitioner, Michael Litzenberger, was found guilty of Possession with intent to deliver a controlled substance (marijuana),[1] Possession of a controlled substance (marijuana),[2] and Criminal conspiracy.[3]

Post-trial motions were denied, and on October 8, 1991, Judge Shenkin sentenced Petitioner to a term of imprisonment of not less than three years nor more than six years, plus a $15,000.00 fine, for Possession with intent to deliver marijuana, and eleven and one-half months to twenty-three months, for Criminal conspiracy, to run concurrent to the Possession with intent to deliver count.

Petitioner appealed from the judgment of sentence to the Superior Court of Pennsylvania, which affirmed the judgment of sentence by a memorandum opinion and order filed on July 13, 1992. Commonwealth v. Litzenberger, 423 Pa. Super. 635, 616 A.2d 716, No. 3284 Philadelphia 1991, J.A26043/92 (1992). A Petition for Allowance of Appeal, filed by Petitioner, was granted by the Supreme Court of Pennsylvania on May 7, 1993, and the instant case was docketed at No. 22 E.D. APPEAL DOCKET 1993. The grant of review was limited to three issues, all concerning the imposition by Judge Shenkin of the mandatory

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[1] 35 P.S. § 780-113(a)(30).

[2] 35 P.S. § 780-113(a)(16).

[3] 18 Pa.C.S.A. § 903(a) (1) and (2).

minimum sentence required by 18 Pa.C.S.A. § 7508(a)(1)(ii) (Supp. 1994) for Possession with intent to deliver 25.7 pounds of marijuana. The instant case was consolidated with Commonwealth v. Bell, No. 35 W.D. Appeal Docket 1992. The Supreme Court of Pennsylvania granted relief and the instant case was remanded to the trial court for resentencing. Commonwealth v. Bell, 537 Pa. 558, 645 A.2d 211 (1994), cert. denied, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, No. 94-1123 (02/21/95). On October 27, 1994, Judge Shenkin sentenced Petitioner to a term of imprisonment of not less than three years nor more than five years, plus a $15,000.00 fine, for Possession with intent to deliver marijuana, and eleven and one-half months to twenty-three months, for Criminal conspiracy, to run concurrent to the Possession with intent to deliver count.

B. FACTS OF THE CASE

On March 21, 1990, at approximately 6:15 p.m., a package was dropped off at a Post Office in Tucson, Arizona. The package was Express Mail addressed to Michael Litz, 1511 Green Lawn Road, Paoli, Pennsylvania, 19301, with a return address of Desert Concept, 2521 Ina Road, Tucson, Arizona, 85741. The Arizona authorities labeled this package as a "suspect" parcel.

This package fit the "profile" of suspicious packages for the following reasons: 1) It was Express Mail, which is used by drug dealers to speed up delivery; 2) It came from a portion of the country (Arizona) that is in close proximity to where marijuana is harvested (Mexico); 3) It was sent during the marijuana harvest season; 4) It was a very large package and very heavy (34 lbs.); 5) The package was heavily taped; 6) There was no East or West on the return address which would normally be associated with Ina Road; 7) There was no company listed as Desert Concept in the

telephone directory; 8) The return address on the package was fictitious.

On March 22, 1990, at 11:45 a.m., a drug dog named Bart sniffed the package. Although Bart did not "alert" to the package it was noted, by the Arizona authorities in their report and told to Postal Inspectors at the Bellmawr Post Office in New Jersey, that Bart "showed interest" in the package.

On March 22, 1990, at 11:30 p.m., the Arizona authorities notified Chuck McManus, a Postal Inspector at the Bellmawr Post Office in New Jersey, about this. On March 23, 1990, at 8:00 a.m., Jerry Piotrowicz, another Postal Inspector at the Bellmawr Post Office in New Jersey, was also notified about the package. The package was scheduled to leave Arizona on March 23, 1990 at 8:00 a.m. to travel through a transfer in Minneapolis and then arrive in Philadelphia on March 23, 1991, at 4:30 p.m. Inspector Piotrowicz waited at Philadelphia Airport, until 7:00 p.m., for the package to arrive. When the package did not arrive that evening, Inspector Piotrowicz asked the airport mail clerk to attempt to find out the possible location of the package. Inspector Piotrowicz was informed that the package was probably removed from the plane it was scheduled to arrive on and was probably waiting to be shipped out. Inspector Piotrowicz explained that this is not an unusual occurrence with packages, since mail of this sort has no priority on the airlines. As he no longer knew which flight the package was on, Inspector Piotrowicz asked the airport mail clerk to ship the package to his Bellmawr, New Jersey postal office when it arrived. When Inspector Piotrowicz arrived for work on March 24, 1990, at 7:30 a.m., the package was at his office.

During the course of its travel the tape had come loose on the package, as the package had been damaged. Based on Inspector Piotrowicz's experience in drug investigations, it was

obvious to him that the package smelled of marijuana. Inspector Piotrowicz contacted Camden County Sheriff Joseph Charles, who brought to the post office a reliable drug dog named Max to sniff the package. At approximately 8:30 - 9:00 a.m., Max alerted positively to the package, indicating the presence of marijuana.

On March 24, 1991, at approximately 9:00 a.m., Inspector Piotrowicz called the Easttown Police Department to inform them of the situation, and at approximately 10:00 a.m. he arrived at the Easttown Police Department with the package. At 10:30 a.m., there was a meeting at the Easttown Police Department, of police officers from the Tredyffrin and Easttown Police Departments, where all the officers had an opportunity to observe the package before a "controlled delivery" was made. Petitioner's property borders Tredyffin and Easttown Townships so that these various officers were brought in to establish surveillance in the two townships.

On March 24, 1990, at approximately 11:40 a.m., Joseph Hamlon, the postman who has delivered mail to Petitioner's residence for the past ten years, delivered the package to Petitioner, who was known by Mr. Hamlon. Petitioner signed for the package, using the name, which was on the package, Michael Litz.

While this package was being delivered, Officer DiMartini and an Assistant District Attorney were at District Justice Pomante's office waiting for the package to be delivered before they presented to District Justice Pomante, for his review, a search warrant they had prepared. After the package was delivered, Inspector Piotrowicz contacted Officer DiMartini at District Justice Pomante's office. Officer DiMartini then amended the search warrant to include the fact that a controlled delivery had been made.

At the time the search warrant was being submitted to the District Justice, Officer Lawrence Meoli, of the Tredyffrin Township Police Department, observed two males enter a car at Petitioner's residence and drive away. When the car drove past him, he observed on the back seat a large white package, which was a package that he had earlier seen at the Easttown Police Department. The package had been identified to him as a package that probably contained marijuana. Officer Meoli called Officer Vincent DiMartini, who instructed him to stop the car. Officer Meoli stopped the car, at approximately 12:00 p.m., and Petitioner was driving.

Herbert Friedman, a forensic scientist at the Lima Crime Lab, tested the contents of the package and concluded that it contained 25.7 pounds of marijuana. Detective Frank Martin, of the Chester County Detectives, concluded that in his expert opinion the 25.7 pounds of marijuana was possessed with the intent to deliver.

Petitioner gave a statement to Officer DiMartini. Petitioner stated that he met a man named Jerry a month before. Jerry said he would send a package to Petitioner's house, containing marijuana, and that Petitioner would receive $400.00 for receiving the package for Jerry.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The suppression court correctly admitted into evidence the 25.7 pounds of marijuana seized from Petitioner, as the suppression court correctly followed this Court's unanimous decision in United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970), which held that Postal authorities may seize and detain a package if they have a reasonable and articulable suspicion that criminal activity exists.

The Petition for a Writ of Certiorari should be denied, as this area of law is well-settled. United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970), the seminal case in this area, and its progeny, hold that Postal authorities may seize and detain a package if they have a reasonable and articulable suspicion that criminal activity exists. Neither the lower federal court nor the various state courts have had any difficulty in following this Court's unanimous decision in Van Leeuwen.

On April 9, 1991, at the conclusion of the suppression hearing, pursuant to Pa.R.C.P. 323 (i), Judge Shenkin made findings of fact and conclusions of law.[4] Judge Shenkin's findings of fact and conclusions of law were contained in an

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[4]When a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible. An appellate court is required to determine whether the record supports the suppression court's factual findings, and whether the inferences and legal conclusions drawn by the suppression court from those findings are appropriate. Commonwealth v. Davis, 491 Pa. 363, 421 A.2d 179 (1980); Commonwealth v. Lawrence, 311 Pa. Super. 326, 457 A.2d 909 (1983).

Opinion and Order dated April 9, 1991. Judge Shenkin also wrote an Opinion in response to the mandate of Pa.R.A.P. 1925(a) dated December 5, 1991. Judge Shenkin's December 5, 1991 Opinion contained findings of fact and conclusions of law consistent with those outlined in his April 9, 1991 Opinion, however, they were more detailed. The Respondent, the Commonwealth of Pennsylvania, relies on Judge Shenkin's December 5, 1991 Opinion when referring to his findings of fact or conclusions of law.

Judge Shenkin properly admitted into evidence the 25.7 pounds of marijuana seized from the vehicle, in which petitioner was the driver. The record clearly supports his factual findings, and the inferences and legal conclusions drawn by Judge Shenkin are appropriate. The record supports Judge Shenkin's factual findings. Judge Shenkin correctly stated:

> The defendant contends that the detention of the package in Arizona and in New Jersey was illegal, and that the seizure after delivery was illegal because of the failure of the Commonwealth to have obtained search or arrest warrants.
>
> In considering the detention of the package by the Arizona authorities, we do not consider that the use of the magic word "profile" advances matters to any degree. The important consideration is the facts which make up the particular profile. So long as those facts <u>in their totality</u> give rise to a reasonable suspicion of criminal activity, the investigatory detention of the package is permissible. Thus, if the testimony were limited to the conclusion that the package "fit a profile," the stop would not be justified. If the testimony goes further and sets forth the facts which make up the profile, but those facts are not sufficient to give rise to a reasonable suspicion of criminal activity, still the stop would not be justified. But when, as here, the testimony sets forth the facts which cause the evidence to fit

the "profile" and those facts are sufficient to give rise to reasonable suspicion, then with or without the conclusion that the facts cause the package to fit a "profile", the investigatory detention is warranted. Thus, we are satisfied that the authorities in Arizona has the requisite legal grounds to detain the evidence in question and subject it to a sniff by a trained canine. State v. Ochoa, 112 Ariz. 582, 544 P.2d 1097 (1976); State v. Graciano, 134 Ariz. 35, 653 P.2d 683 (1982). See also United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). Inspector Piotrowicz had knowledge of this same information, which was sufficient cause to permit him to direct the package to be routed to his office and to then investigate the package upon its arrival.

We have considered the possibility that the inconclusive result of the dog sniff in Arizona negated the reasonableness of the suspicion of Inspector Piotrowicz and have concluded that if did not. In other words, the information known to Inspector Piotrowicz was the same as that known to the Arizona authorities when they first detained the package except that Inspector Piotrowicz knew from his first contact with the case (which the Arizona authorities did not originally know) that the canine sniff conducted in Arizona was inconclusive. When a law enforcement officer has a reasonable suspicion based upon facts which he believes to be true and then discovers that one or more of those "facts" turns out to be untrue, the basis for holding the reasonable suspicion may in some cases be destroyed, Commonwealth v. Daniels, 410 Pa. Super. 275, 599 A.2d 988 (1991) but that will not invariably be the result. Each set of facts must be examined on a case by case basis to determine whether or not the remaining facts, considered in the context of the additional information that a fact (such as a key element of a profile) at first assumed to be true is found to be false, still give rise to a reasonable suspicion. In this case we are satisfied that at the time Inspector Piotrowicz decided to detain the package for investigation, the totality of the

> circumstances gave rise to a reasonable suspicion of criminal activity and justified his further examination of the package. Causing the package to be routed via his Bellmawr office does not cause such a removal from the stream of commerce so as to be in and of itself a seizure of the package, beyond the limits of investigation permitted on the basis of a reasonable suspicion. Of course, once Inspector Piotrowicz personally observed the package and smelled the odor emanating from it, the level of his suspicions naturally rose. The positive alert given by Max, the trained drug sniffing canine, served to increase that suspicion to the point where the facts then known to Inspector Piotrowicz constituted probable cause to obtain a warrant to seize and search the package.

December 5, 1991 Opinion of the Honorable Robert J. Shenkin at 5-7 (footnotes omitted) (emphasis in original).

This area of law is well-settled. United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970), the seminal case in this area, and its progeny, hold that Postal authorities may seize and detain a package if they have a reasonable and articulable suspicion that criminal activity exists. In Van Leeuwen, the "reasonable suspicion" was as follows, that Van Leeuwen dropped off two 12 pound packages at a post office in Mount Vernon, Washington, a town near the Canadian border. One package was addressed to California the other to Tennessee. A police officer noticed that the return address on the packages was a vacant housing area at a nearby college, while Van Leeuwen's license plates were from Canada.

In Van Leeuwen, Mr. Justice Douglas, writing for an unanimous Court stated:

> The nature and weight of the packages, the fictitious return address, and the British Columbia license plates of

> respondent who made the mailings in this border town certainly justified detention, without a warrant, while an investigation was made... The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures." Theoretically - and it is theory only that respondent has on his side - detention of mail could at some point become an unreasonable seizure of "papers" or "effects" within the meaning of the Fourth Amendment.

Id. at 252, 90 S.Ct. at 1032, 25 L.Ed.2d at 285.

In the instant case, Postal authorities had a reasonable and articulable suspicion that criminal activity existed. This package fit the "profile" of suspicious packages as outlined above. The argument that this "reasonable suspicion" was eliminated by the failure of Bart, the drug dog, to alert to the package in Arizona is not persuasive for the following reasons. Bart did not ignore the package in Arizona, he "showed interest" in the package. Consequently, Bart's reaction to the package does not support a negative inference that drugs were not in the package, as argued by Petitioner. Consequently, Judge Shenkin, as fact finder correctly rejected this inference. Moreover, all the factors that pointed to the fact that this package contained drugs still existed regardless of how Bart reacted to the package. The circumstances surrounding the package in the case at bar are at least as suspicious as those in Van Leeuwen.

In Van Leeuwen one of the packages was detained for 29 hours after its mailing before a search warrant was obtained. This Court specifically declined to set time limits on the detention of a package, instead making the issue the reasonableness of the detention. This Court stated:

> The rule of our decision certainly is not that first-class mail can be detained 29 hours after mailing in order to obtain the search warrant needed for its inspection. We only hold that the facts of this case - the nature of the mailings, their suspicious character, the fact that there were two packages going to separate destinations, the unavoidable delay in contacting the more distant of the two destinations, the distance between Mt. Vernon and Seattle - a 29-hour delay between the mailings and the service of the warrant cannot be said to be "unreasonable" within the meaning of the Fourth Amendment. Detention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant.

Id. at 253, 90 S.Ct. at 1032-1033, 25 L.Ed.2d at 286.

In Van Leeuwen this Court did not establish or apply a bright line rule for time limits on the detention of a package, instead making the issue the reasonableness of the detention, on a case by case basis. Several subsequent cases have held that detentions were reasonable in factual situations similar to the case at bar. These cases also demonstrated that neither the lower federal court nor the various state courts have had any difficulty in following this Court's unanimous decision in Van Leeuwen.

In United States v. Mayomi, 873 F.2d 1049 (7th Cir. 1989), envelopes that were believed to contain heroin were received by a private mailbox service, on Saturday, July 12, 1988. An FBI Agent told the service to hold the envelopes over the weekend until the following Monday. On Monday, July 14, 1988, a dog sniff was performed, the dog alerted positively to the envelopes, and a search warrant was obtained. The United States Court of Appeals for the Seventh Circuit stated:

> With regard to the two letters received on July 12, it is important to note that the letters were detained only over the weekend and for the sole purpose of subjecting them to a canine sniff test by two specially trained dogs that had detected the presence of heroin on prior occasions.
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> We therefore hold that under the facts of this case the length of time the envelopes were detained comports with the standards set forth in United States v. Van Leeuwen, [397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970)] and United States v. Place, [462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)]. The detention of the defendant's mail for a period of forty-eight hours in order to confirm [the FBI's] suspicion that the three envelopes contained heroin did not invade his rights under the Fourth Amendment. We emphasize as did the Supreme Court in Van Leeuwen, that the significant Fourth Amendment interest was in the privacy of this mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

Id. at 1054 (footnotes omitted).

In State v. Stanphill, 53 Wash. App. 623, 769 P.2d 861 (1989), the package in question was supposed to be delivered in one day since it was Express Mail. The mail was sent to the Post Office on Thursday, July 2, 1987. A canine sniff was performed that day and the dog alerted positively to the package. The package was detained until Monday, July 6, 1987 by Postal authorities until a federal search warrant could be obtained. In rejecting Stanphill's claim that this four day delay was unreasonable, the Washington Court stated: "Given the probable cause provided by the canine sniff, the minor level of intrusiveness in detaining the package, the distance between Walla Walla and Spokane, and the intervening holiday, we find the delay until Monday morning was reasonable." Id. at ___, 769 P.2d at 865.

In United States v. Aldaz, 921 F.2d 227 (9th Cir. 1990), the United States Court of Appeals for the Ninth Circuit found the following facts sufficient to constitute a "reasonable suspicion" that contraband was in various packages, thus permitting the police to detain the packages for the purpose of a canine sniff. A Postal Inspector in one city in Alaska informed a second Postal Inspector that Aldaz, according to police, was a suspected drug dealer. Aldaz had no job, yet he had money. Three packages mailed by Aldaz were mailed in a suspicious manner. Aldaz sent a package with his girlfriend's return address while she sat outside in a car. Aldaz's girlfriend then came in to the Post Office and mailed a package with the Aldaz's return address while he sat in the car.

In Aldaz, the court held that a six day detention of one package, and a three day detention of three additional packages, mailed by Aldaz who was suspected of using the mail for drug trafficking, did not violate the Fourth Amendment. Most of the delays were beyond the government's control, and the remaining delays, including five hours between a canine sniff and the execution of a search warrant, were not unreasonable. In Aldaz, Aldaz mailed a package via express delivery on Saturday, October 8, 1988. Because of the mail schedule, that package did not leave the Post Office until October 11, 1988. On October 11, 1988, Aldaz mailed three additional packages. These packages did not arrive on the scheduled flight, as it was canceled. Consequently, the Postal Inspector did not know on which flight the packages would arrive. The packages were sent on a substitute flight, and did not arrive until 1:00 a.m., on October 13, 1988. The Postal Inspector did not receive the packages until 4:28 p.m., on October 13, 1988. The Postal Inspector immediately attempted to arrange a drug detection canine sniff, but no dogs were available. On October 14, 1988, at 9:45 a.m., a reliable drug dog gave a positive alert on all four packages. The necessary paperwork was prepared and search warrants were obtained, at 3:05 p.m., for the

three packages mailed on October 11, 1988. A search of the three packages revealed marijuana.

In Aldaz, the delay was due to several factors: 1) The package was not on its scheduled flight, consequently, the Postal Inspector did not know what flight to wait for; 2) When the package arrived it was in the evening hours and the Postal Inspector could not obtain a drug dog; 3) It took five hours for the Postal Inspector to obtain a search warrant after the drug dog had alerted positively.

In Aldaz, the Ninth Circuit applying United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970), determined that the detention was reasonable. The court rejected arguments that prior Ninth Circuit cases, United States v. Hillison, 733 F.2d 692 (9th Cir. 1984) and United States v. Dass, 849 F.2d 414 (9th Cir. 1988), had interpreted Van Leeuwen as creating an outer boundary of 29 hours for detentions. The court held that the test under Van Leeuwen is whether the detention of the package is reasonable.

The length of the detention of the package in the case at bar was reasonable under the circumstances, as it was in Van Leeuwen, Mayomi, Stanphill, and Aldaz. On March 21, 1990, at approximately 6:15 p.m., a package was dropped off at a Post Office in Tucson, Arizona. The Arizona authorities labeled this package as a "suspect" parcel, as it fit the "profile" of suspicious packages. On March 22, 1990, at 11:45 a.m., a drug dog named Bart sniffed the package.[5] Although Bart did not "alert" to the package, he "showed interest" in it. On March 22, 1990, at 11:30

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[5]Petitioner does not contend that the dog sniff of the package in Arizona was illegal. Petitioner only challenges the subsequent detention of the package.

p.m., and again on March 23, 1990, at 8:00 a.m., Postal Inspectors at the Bellmawr Post Office in New Jersey, were also notified about the package.

The package was scheduled to leave Arizona on March 23, 1990 at 8:00 a.m. to travel through a transfer in Minneapolis and then arrive in Philadelphia on March 23, 1991, at 4:30 p.m. Inspector Piotrowicz waited at Philadelphia Airport until 7:00 p.m. for the package to arrive.

When the package did not arrive that evening, Inspector Piotrowicz asked the airport mail clerk to attempt to find out the possible location of the package. Inspector Piotrowicz was informed that the package was probably removed from the plane it was scheduled to arrive on and was probably waiting to be shipped out. Inspector Piotrowicz explained, this is not an unusual occurrence with packages, since mail of this sort has no priority on the airlines. All individuals who mail packages, even those using the mail for drug trafficking, are subject to the rules of the airlines. As he no longer knew which flight the package was on, Inspector Piotrowicz asked the airport mail clerk to ship the package to his Bellmawr, New Jersey postal office when it arrived. Inspector Piotrowicz, like the Postal Inspector in Aldaz, did not know when the package would arrive.

The only re-routing of the package by law enforcement was when it was taken, sometime in the evening of March 23, 1990 or early morning of March 24, 1990, to Inspector Piotrowicz's office. When Inspector Piotrowicz arrived for work on March 24, 1990, at 7:30 a.m., the package was at his office. During the course of its travel the tape had come loose on the package, as the package had been damaged. Based on Inspector Piotrowicz's experience in drug investigations, it was obvious to him that the package smelled of marijuana. Inspector Piotrowicz immediately contacted Camden County Sheriff Joseph Charles,

who brought to the post office a reliable drug dog named Max to sniff the package.[6] At approximately 8:30 - 9:00 a.m., Max alerted positively to the package, indicating the presence of marijuana.

On March 24, 1991, at approximately 9:00 a.m., Inspector Piotrowicz called the Easttown Police Department to inform them of the situation, and at approximately 10:00 a.m. he arrived at the Easttown Police Department with the package. At 10:30 a.m., there was a meeting at the Easttown Police Department, of police officers from the Tredyffrin and Easttown Police Departments, where all the officers had an opportunity to observe the package before a "controlled delivery" was made.

On March 24, 1990, at approximately 11:40 a.m., the package was delivered to Petitioner. The difference in time from the dog sniff at 9:00 a.m., the controlled delivery made at approximately 11:40 a.m., and the ultimate search of the package at approximately 12:00 p.m., is much less than the five hours it took the police to do the same in Aldaz.

While this package was being delivered, Officer DiMartini and an Assistant District Attorney were at the District Justice's office waiting for the package to be delivered before they presented to the District Justice for review a search warrant they had prepared. After the package was delivered, Inspector Piotrowicz contacted Officer DiMartini at District Justice's office. Officer DiMartini then amended the search warrant to include the fact that a controlled delivery had been made. Before the search

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[6]Petitioner does not contend that the dog sniff of the package in New Jersey was illegal. Petitioner only challenges the detention and subsequent re-routing of the package to Inspector Piotrowicz's office in New Jersey.

warrant could be obtained, Petitioner forced the police to make a warrantless arrest, based on exigent circumstances, by attempting to leave with the package.

The detention of this package was not unreasonable. Most of the delay stemmed from the package being removed from the plane it was scheduled to arrive on, since mail of this sort has no priority on the airlines. This delay was not the result of any state action. Any remaining delays were not unreasonable under the circumstances.

In addition to his federal constitutional arguments, Petitioner cites federal postal regulations in support of his argument. However, Petitioner concedes that this argument was not presented to any of the courts below. Petitioner states; "The federal statutory issue was not raised, but on the facts of this case does not call for any different analysis." Petition for Writ of Certiorari at 11. Consequently, as this argument was not raised below, it cannot support a grant of certiorari. This Court does not decide questions not raised in the lower court. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

CONCLUSION

WHEREFORE, Respondent respectfully requests this Honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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